



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Tax TITLE-SERIES: 110-15M
RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: 110-15M Vendor Absorption or Assumption of Sales and Use Tax

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: W. Va. Code §11-10-5, and §11-15A-8(b)

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The proposed new rule is required by the provisions of W. Va. Code §11-15A-8(b), and allowed pursuant to the provisions of W. Va. Code §11-10-5. The rule explains its genesis; provides definitions; sets forth requirements for absorbing or assuming the sales and use tax; provides guidance regarding who the taxpayer is and who receives any refund if the retailer absorbs or assumes the sales and use tax; and provides guidance regarding how the assumption or absorption is applied with regard to municipal sales and use taxes, motor vehicle sales, the motor fuel tax, and the special district excise tax.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/3/2021

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/7/2021

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

POSTED ON WV TAX DEPARTMENT WEBSITE

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

The proposed new rule provides guidance regarding how a retailer may absorb or assume payment of the sales or use tax, and provides guidance regarding the consequences flowing from such action.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The proposed new rule is required by the provisions of W. Va. Code §11-15A-8(b), and allowed pursuant to the provisions of W. Va. Code §11-10-5. The rule explains its genesis; provides definitions; sets forth requirements for absorbing or assuming the sales and use tax; provides guidance regarding who the taxpayer is and who receives any refund if the retailer absorbs or assumes the sales and use tax; and provides guidance regarding how the assumption or absorption is applied with regard to municipal sales and use taxes, motor vehicle sales, the motor fuel tax, and the special district excise tax.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

This legislative rule addresses certain requirements that must be followed if a vendor absorbs or assumes sales tax, and addresses certain consequences of such action. The stated purpose of this legislative rule is to permit vendors to assume or absorb any sales or use tax assessed on tangible personal property. This legislative rule contains a sunset provision which provides the rule shall terminate and have no further force or effect on or after August 1, 2027. Our interpretation of this legislative rule is that the consumer does not have to pay Consumer Sales Tax if the tax is assumed or absorbed by the vendor. There would be no revenue impact in relation to this provision. Additional administrative costs incurred by the Tax Department would be \$5,000 in FY 2022.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

This legislative rule addresses certain requirements that must be followed if a vendor absorbs or assumes sales tax, and addresses certain consequences of such action. The stated purpose of this legislative rule is to permit vendors to assume or absorb any sales or use tax assessed on tangible personal property. This legislative rule contains a sunset provision which provides the rule shall terminate and have no further force or effect on or after August 1, 2027. Our interpretation of this legislative rule is that the consumer does not have to pay Consumer Sales Tax if the tax is assumed or absorbed by the vendor. There would be no revenue impact in relation to this provision. Additional administrative costs incurred by the Tax Department would be \$5,000 in FY 2022.

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

This legislative rule addresses certain requirements that must be followed if a vendor absorbs or assumes sales tax, and addresses certain consequences of such action. The stated purpose of this

legislative rule is to permit vendors to assume or absorb any sales or use tax assessed on tangible personal property. This legislative rule contains a sunset provision which provides the rule shall terminate and have no further force or effect on or after August 1, 2027. Our interpretation of this legislative rule is that the consumer does not have to pay Consumer Sales Tax if the tax is assumed or absorbed by the vendor. There would be no revenue impact in relation to this provision. Additional administrative costs incurred by the Tax Department would be \$5,000 in FY 2022.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	5,000.00	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	5,000.00	0
2. Estimated Total Revenues	0	0	0

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

This legislative rule addresses certain requirements that must be followed if a vendor absorbs or assumes sales tax, and addresses certain consequences of such action. The stated purpose of this legislative rule is to permit vendors to assume or absorb any sales or use tax assessed on tangible personal property. This legislative rule contains a sunset provision which provides the rule shall terminate and have no further force or effect on or after August 1, 2027. Our interpretation of this legislative rule is that the consumer does not have to pay Consumer Sales Tax if the tax is assumed or absorbed by the vendor. There would be no revenue impact in relation to this provision. Additional administrative costs incurred by the Tax Department would be \$5,000 in FY 2022.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 110
LEGISLATIVE RULE
STATE TAX DEPARTMENT

SERIES 15M
VENDOR ABSORPTION OR ASSUMPTION
OF SALES AND USE TAX

§110-15M-1. General.

1.1. Scope. -- This rule addresses certain requirements that must be followed if a vendor absorbs or assumes sales tax, and addresses certain consequences of such action.

1.2. Authority. -- W. Va. Code §11-10-5, and §11-15A-8(b).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on and after August 1, 2027.

§110-15M-2. Background.

Prior to 2021, it was unlawful for a retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the West Virginia Consumers Sales and Service Tax and Use Tax would be assumed or absorbed by the retailer, or that any part of the tax would be refunded to the purchaser, consumer or user by the retailer. Pursuant to SB 661, enacted during the 2021 regular legislative session, W. Va. Code §11-15A-8 was amended, along with various other sections of the code, to allow retailers to absorb or assume the sales and use tax if certain requirements are met.

§110-15M-3. Definitions.

3.1. Unless a specific definition is provided under this section heading, or the context in which the term is used clearly requires a different meaning, the definitions of terms used in this rule are the same as the definitions of those terms found in W. Va. Code §11-15-1, *et seq.*, §11-15A-1, *et seq.*, and §11-15B-1, *et seq.*

3.2. “Retailer,” “seller,” and “vendor” may be used interchangeably in this rule, and are generally defined as those terms are defined in W. Va. Code §11-15-1, *et seq.*, §11-15A-1, *et seq.*, and §11-15B-1, *et seq.*

3.3. “Sales tax” means the West Virginia Consumers Sales and Service Tax set forth in W. Va. Code §11-15-1, *et seq.* Unless context requires that the term refer only to the West Virginia Consumers Sales and Service Tax, “sales tax” should be understood to implicitly also mean the West Virginia Use Tax set forth in W. Va. Code §11-15A-1, *et seq.*, as the two taxes are complementary.

3.4. “Use tax” means the West Virginia Use Tax set forth in W. Va. Code §11-15A-1, *et seq.* Unless context requires that the term refer only to the West Virginia Use Tax, “use tax” should be understood to

implicitly also mean the West Virginia Consumers Sales and Service Tax set forth in W. Va. Code §11-15-1, et seq., as the two taxes are complementary.

§110-15M-4. Requirements for absorbing or assuming the tax.

4.1. A retailer may directly or indirectly advertise, hold out, or state to a customer or to the public that the retailer will absorb or assume the tax for the customer if:

4.1.1. The retailer indicates in the advertisement, holding out, or statement that the retailer is paying the tax for the customer;

4.1.2. The retailer does not indicate or imply in the advertisement, holding out, or statement that the sale is exempt or excluded from taxation; and

4.1.3. Any purchaser's receipt or other statement given to the customer listing the sale price paid or to be paid by the customer separately states the total amount of the tax and indicates how much of the total tax will be paid by the retailer.

4.2. Any sales tax or use tax that is absorbed or assumed by a retailer must be remitted and reported by the retailer the same as if it had been paid by the retailer's customer.

4.3. When recording a sale for which the retailer absorbed or assumed the sales tax or use tax, the retailer must separately state the purchase price and the tax and indicate how much of the tax it absorbed or assumed.

§110-15M-5. Identity of the taxpayer.

5.1. When a retailer absorbs or assumes payment of all or part of the sales tax, the retailer is personally liable for payment of the amount of the tax absorbed or assumed, consistent with the provisions of W. Va. Code §11-15-4a.

5.2. The purchaser, consumer, or user of the tangible personal property or service is not considered the taxpayer for any portion of the sales tax that is absorbed or assumed by the retailer.

5.3. The purchaser, consumer, or user of the tangible personal property or service is considered the taxpayer for any portion of the sales tax that is not absorbed or assumed by the retailer.

§110-15M-6. Refunds.

6.1. A retailer that absorbs or assumes payment of the sales tax ordinarily due from its customer is considered the taxpayer with regard to that portion of the sales tax absorbed or assumed.

6.2. As the taxpayer of that portion of the sales tax it assumes or absorbs, a retailer may file for a refund of taxes paid.

6.3. No refund shall be paid to a retailer that absorbs or assumes any part of the sales tax unless the retailer can prove that it first paid the tax.

6.4. Records and documents relating to and supporting the request for refund of assumed or absorbed sales and use tax, penalty, or interest must show that sales and use tax was separately stated from the sale price on any record of sale, and conclusively demonstrate that the vendor paid the sales and use tax on behalf of the buyer, and that the tax was timely remitted to the State.

§110-15M-7. Application to municipal sales and use taxes.

7.1. Pursuant to W.Va. Code §§8-1-5a and 8-13C-1, et. seq. municipal sales and use tax is to be administered in the same manner as the state sales and use tax. Therefore, retailers are permitted to absorb or assume the municipal sales and use tax provided the requirements of section 4 of this rule are met.

§110-15M-8. Application to sales tax on motor vehicle sales.

8.1. This rule does not apply to the sales tax imposed on motor vehicle sales pursuant to W. Va. Code §11-15-3c.

8.2. The sales tax imposed on motor vehicle sales pursuant to W. Va. Code §11-15-3c is collected by the West Virginia Division of Motor Vehicles, and any request for refund of that tax must be submitted to the Division of Motor Vehicles.

§110-15M-9. Application to motor fuel tax.

9.1. This rule does not apply to the motor fuel tax as imposed pursuant to W. Va. Code §11-15-8b and §11-15A-13a.

9.2. The motor fuel tax as imposed pursuant to W. Va. Code §11-15-8b and §11-15A-13a is essentially a tax imposed at the wholesale level.

§110-15M-10. Application to special district excise tax.

10.1. This rule does apply to the special district excise tax as imposed pursuant to W. Va. Code §7-22-1, et. seq. and §8-38-1, et. seq.

10.2. Retailers are permitted to absorb or assume the special district excise tax in the same manner and under the same rules as provided in this rule as if it were the state sales and use tax.